BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

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| EASTLAKE COMMUNITY COUNCIL, FLOATING HOMES ASSOCIATION, PORTAGE BAY/ROANOKE PARK COMMUNITY COUNCIL and ROANOKE PARK ASSOCIATION,<br><br>Appellants,<br><br>v.<br><br>CITY OF SEATTLE and DALLY DEVELOPMENT CORPORATION,<br><br>Respondents,<br><br>and<br><br>JOHN ISAKSEN, PAT ISAKSEN and TONY BOZANICH,<br><br>Intervenor/Respondents. | SHB Nos. 90-8 & 90-9<br><br>ORDER OF PARTIAL SUMMARY JUDGMENT, WAIVER AND DISMISSAL |

## I. PARTIAL SUMMARY JUDGMENT

On July 16, 1990, respondents Dally Development Corporation and City of Seattle filed motions for Partial Summary Judgment. On August 14, 1990, appellants Eastlake Community Council and Floating Homes Association filed replies. On August 21, 1990, respondent Dally Development Corporation and City of Seattle filed rebuttals. At 9:00 a.m. on Friday, August 31, 1990, the oral argument of counsel was heard on the motions before William A. Harrison, Administrative Appeals Judge, presiding, and Members Harold S. Zimmerman, Nancy Burnett, Paul Cyr and Robert Hughes. Judith A. Bendor, Chair,

reviewed the record.. Appearances were as follows:

1. Eastlake Community Council and Floating Homes by Henryk Hiller, Attorney at Law.

2. Portage Bay/Roanoke Park Community Council and Roanoke Park Association did not appear by Shirley Mesher, Land Use chair, but authorized argument on their behalf by Eastlake and Floating Homes.

3. Dally Development Corporation by John W. Hempleman and Daniel Vaughn, Attorneys at Law.

4. City of Seattle by Miriam Reed, Assistant City Attorney.

The following documents were considered in conjunction with this motion:

1. City of Seattle's Motion for Pre-Hearing Ruling and attachments;

2. Respondent Dally's Memorandum in Support of Motions for Partial Summary Judgment and attachments;

3. Eastlake Community Council and Floating Homes Associations Memorandum in Opposition to respondent's Motion for Partial Summary Judgment and attachments;

4. City of Seattle's Reply Brief on Summary Judgment;

5. Respondent Dally's Reply Memorandum in Support of Motions for Summary Judgment and attachments.

Having considered the motions, affidavits and other attachments, having heard the argument of counsel, and being fully advised, we now

conclude that there are no genuine issues of material fact and that summary judgment should be granted on the following four issues:

1. Whether the proposed offices above the ground floor are inconsistent with the SSMP, SMC 23.60.600(C)(1)(d), when those offices are not associated with a water-dependent use on the ground floor?

The proposed project is located in a shoreline Urban Stable environment as designated in the Seattle Shoreline Master program. There is no dispute that the offices above the ground floor (headquarters for the construction company permittee) are not associated with the ground floor facilities (a rowing club). The construction company offices are not water dependent. The rowing club facilities are water dependent.

The pertinent provision of Seattle's Shoreline Master Program, SM 23.60.600(c)(1)(d) permits:

> *The following non-water dependent commercial uses on dry land . . .*
> *(d) Offices in the Lake Union area above the ground floor of a structure when permitted uses other than office or residential uses occupy the ground floor level . . .*

A rowing club is permitted under SMC 23.60.600(G) as a water dependent use. Thus, the sum total of the master program provisions is to permit the proposed offices above the rowing club proposed for the ground floor.

Seattle has filed the affidavit of its Building Plans Examiner,

Gay Westmoreland, who states:

> *. . . it is my responsibility to review projects for compliance with the Seattle Shoreline Master Program (SSMP), which is Chapter 23.60 of the Seattle Municipal Code. I am thus familiar with the SSMP and with DCLU policies for interpreting and applying it.*
>
> *. . . I have never required the water-dependent use to be related to the non-water dependent use . . .*

On review, we too see no requirement in this provision of the Seattle Shoreline Master Program that non-water dependent offices above the ground floor be associated with the water dependent use on the ground floor. Respondents' motion for summary judgment should be granted on this issue.

2. Whether the SSMP, SMC 23.60.600(C)(1)(d), is inconsistent with the SMA (RCW 90.58.020; 90.58.140; WAC 173-16-060) if it allows non-water dependent offices above the ground floor?

Under the Shoreline Management Act, our responsibility is to review proposed development for consistency with both the applicable shoreline master program and the provisions of the Shoreline Management Act. RCW 90.58.140(2)(b). We have held that a master program presumptively invokes the policies of the Act. Nisqually Delta Association, et al. v. City of Dupont and Weyerhaeuser Company, SHB No. 81-8 and 81-36 (1982). However, the Act itself remains controlling in its own right. Washington Environmental Council v. Department of Transportation, SHB Nos. 86-34, 86-36 and 86-39 (1988).

It follows from this that we have jurisdiction to review the consistency of a master program provision, as applied, with the Act. Massey v. Island County, SHB No. 80-3 (1981), Hastings v. Island County, SHB No. 86-27 (1988). Our review is governed by established principles: 1) where the legislature has specifically delegated rule making power to an agency, the regulations are presumed valid, 2) one asserting invalidity has the burden of proof, 3) the challenged regulations are to be reasonably consistent with the statutes they implement. Weyerhaeuser Company v. Department of Ecology, 86 Wn.2d 310 (1976). Rules must be written within the framework and policy of the applicable statutes. State Employees v. Personnel Board, 87 Wn.2d 823, 827 (1976).

The policy of the Act is set forth at RCW 90.58.020. It states, in pertinent part:

> *" . . . coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state . . .*

It further states that:

> *"It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses."*

Finally the policy states that those uses are to be preferred:

> *. . . which are consistent with the control of pollution, and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those*

*limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. (Emphasis added.)*

Some future additional development along the shoreline is contemplated by the Act when it is the product of careful, managed, coordinated planning which is in the public interest. Department of Ecology v. Ballard Elks, 84 Wn.2d 551 (1974).

In this case, Seattle has applied its master program to permit a hybrid building with a water dependent rowing club on the ground floor and non-water dependent offices above it. The question then is whether this application of the master program is reasonably consistent with the Act and within its framework and policy.

In arguing the case, both sides cite Adams v. Seattle, SHB No. 156 (1975). In that case non-water dependent offices were proposed above previously permitted boat moorages. We sustained Seattle's denial of the offices on grounds of inconsistency with the then prevailing Seattle draft master program. Conclusion of Law VIII, p. 6. This was sufficient to sustain the result. See RCW 90.58.140(2)(a). However, we went on to conclude at Conclusion of Law

IV, p. 5 that:

> *Any office building which is not an integral part of or related to, a water dependent use would be inconsistent with the policy of the Act unless the entire development would "provide an opportunity for substantial numbers of the people to enjoy the shoreline of the state." (RCW 90.58.020). (Emphasis added).*

There was no indication in Adams one way or the other that the Adams permit was inconsistent with the previous permit for moorage. On reflection, and in the light of other cases reviewed in this opinion, we conclude that the Adams apparent, absolute requirement of "integral part of or related to" was incorrect and must be overruled.

The first case to be considered was decided just prior to Adams. In Department of Ecology v. New England Fish Company (NEFCO), SHB No. 158 (1974) an office building some 80 feet high, and which was found not to be water dependent, was approved by Seattle and affirmed here on review. The Adams case cited NEFCO for the proposition that the Act's policy does not require manadatory water dependent use so long as public enjoyment of the shorelines is permitted. In NEFCO a public trail was dedicated along the shoreline. Thus a conflict arose at the outset between Adams and NEFCO. In NEFCO non-water dependent offices were approved where offered in conjunction with public access. In Adams non-water dependent offices were denied although offered in conjunction with water dependent use. Yet nothing in the policy of the Act confers any lesser priority upon water dependent uses relative

to public access. To the contrary, each is of equal dignity under the Act. Yet NEFCO was not decided upon the basis that the office building was somehow "an integral part of or related to" the public access. Neither should Adams have sought that linkage between the office building and the water dependent use. To do so would render water dependent use less compelling than public access while the Act sets these forth as equally preferred.

The second case to be considered is Larkin v. Department of Ecology, SHB No. 84-21 (1984). In that case a non-water dependent office affording insignificant ("cosmetic") public access was reviewed. Although the office was offered in conjunction with a restaurant, we reviewed it as a change of use in isolation from the restaurant. Owing to the particular facts of that case, we affirmed. In doing so we expressly held the proposed general office use to be not inconsistent with RCW 90.58.020. Larkin Conclusion of Law VII, p. 13. Such a Conclusion, without any finding of integral relation to a water dependent use and viewing the office in isolation from the restaurant, is contrary to the Adams requirement that, "Any office building which is not an integral part of, or related to, a water dependent use would be inconsistent with the policy of the Act . . ." We now overrule that requirement of Adams.

Seattle's master program provision, SMC 23.60.600(C)(1)(D), allowing mixed water dependent and non-water dependent use is

reasonably consistent with the Shoreline Management Act and WAC 173-16-060. Respondents' motion for summary judgment should be granted on this issue.

3. Whether the proposed project is or includes a "water-dependent" use under the SMA and SSMP so as to allow, among other things, office use above the ground floor, when there is no evidence of a binding long term agreement for a water-dependent use at the site and no conditions on the permit requiring that a water dependent use be maintained at the site?

Appellant concedes that if a rowing club were in fact to exist at the site, it would constitute a water dependent use. Eastlake Memorandum, page 3, lines 5-7. The issue then, is whether a rowing club is required to be maintained by this permit. We hold that it is.

A rowing club is explicitly set forth as an element of this permit. Eastlake Memorandum Exhibit A (Master Use and Constuction Application and Permit) and Exhibit B (Permit for Shoreline Management Substantial Development). As such it is not only permitted but required, if development under the permit proceeds. See SAVE v. City of Bothell, SHB No. 85-39 (1986) at Conclusion of Law X, p. 14. Permits which are issued and sustained run with the land. Goodman v. City of Spokane, SHB No. 214 (1976). Changes to a permit must be made by further proceedings consisting of either a permit revision (WAC 173-14-064) or a new permit. Either is appealable here. A change to

a permit which is inconsistent with the Act and master program will not stand. Gislason v. Town of Friday Harbor, SHB No. 81-22 (1981).

Neither the Act nor any other cited authority require an interest in property as a requirement for a permit. Plimpton v. King County, SHB No. 84-23 (1985), Casey v. Tacoma, SHB No. 79-19 (1979). The lack of a long term agreement between Dally and the Rowing Club is not a bar to issuance of this permit. Construction and maintenance of the rowing club facilities are, however, vital to compliance with this permit.

The proposed project includes a water dependent use so as to allow office use above the ground floor. Respondents' motion for summary judgment should be granted on this issue.

4. Whether the proposed shoreline substantial development permit is consistent with the requirements of the SMA and SSMP when the proposed parking for the project is: a) on a leased parking area, b) when the lease may be terminated on short notice, c) when required federal approval of the proposed parking lot has not yet been obtained, and/or, d) when the proposed parking spaces are on a site the use of which must be for public rather than private benefit?

The Seattle Shoreline Master Program incorporates parking requirements under SMC 23.60.156 which appear at SMC 23.54.025. These provide in pertinent part:

> *When parking is provided on a lot other than the lot of the use to which it is acacessory the following conditions apply:*

> *A. The owner of the parking spaces shall be responsible for notifying the Director should the use of the lot for covenant parking cease . . .*
>
> *B. A covenant between the owner or operator of the principal use, the owner of the parking spaces and the City of Seattle stating the responsibilities of the parties shall be executed.*

A covenant has been executed for parking spaces. Dally's Memorandum, Exhibit B. Nothing in the Act or the Seattle Shorelines Master Program, including the provisions above, render this parking covenant improper because: a) it is for a lease area, b) the lease may be terminated, c) the lease may require an additional federal approval, or d) the lease may confer private benefit. None of those factors are specifically addressed in the Act or master program. Moreover, these factors do not alone or in combination, create a likelihood that the parking covenant will fail. Seattle has filed the affidavits of its Land Use Specialist, Corbitt Loch and its Building Plans examiner, Gay Westmoreland, who declare:

> *DCLU has accepted parking on land leased from the state Department of Transportation (DOT). DCLU recognizes that DOT leases are revocable at will. (Pg. 3).*

There is no responsive affidavit which would single out this parking arrangement from other such DOT leases. While there is documentation of one DOT lease cancellation in appellant's filings, that instance involved a 20 year lease that DOT proposed to cancel after some 14

years. We are not persuaded that the covenant for parking here is either infirm nor inconsistent with either the Act or Seattle Shoreline Master Program. Respondents' motion for summary judgment should be granted on this issue.

On September 10, 1990, an oral ruling was announced to the parties granting summary judgment on issues 2, 3, 4 and 5 of the Pre-Hearing Order entered June 13, 1990.

## II. WAIVER

On September 11, 1990, appellants Eastlake Community Council and Floating Homes Association and respondent Dally Development Corporation posed this question to the Board by letters: Does not the partial summary judgment on issues 2, 3, 4 and 5 necessarily grant summary judgment on Issues I.(1)(d) and I.(1)(f) also?

On Septmeber 12, 1990, a hearing by telephone was conducted before Judge Harrison with appearances as previously. As to issue I.(1)(d), summary judgment is granted as to the propriety of the DOT parking lease but not as to 1) the number of parking spaces or 2) the necessity of loading berths. The latter two points are therefore within the voluntary dismissal of part III hereof. As to issue I.(1)(f) summary judgment is granted except as to the forty percent (40%) lot coverage. Judge Harrison heard argument as to whether any 40% lot coverage issue was waived, and ruled that appellants had waived any such issue, on the record, during the motion argument of August 31, 1990.

## III. DISMISSAL

On September 13, 1990, appellant Eastlake Community Council, and Floating Homes Association moved for mandatory dismissal of those issues that remain unresolved following the rulings of partial summary judgment and waiver. The motion should be granted under WAC 461-08-010 adopting the civil rules of court and CR 41(a)(1).

On September 14, 1990, appellant Portage Bay/Roanoke Park Community Association and Roanoke Park Association withdrew as parties in this matter.

WHEREFORE, IT IS ORDERED:

1. Summary Judgment is granted to respondents on issues 2,3, 4 and 5 of the Pre-Hearing Order entered June 13, 1990.

2. Summary Judgment is granted to respondents on issues I.(1)(d) and I.(1)(f) as set forth in part II hereof.

3. Appellants have waived any issue that the proposed development violates Seattle Municipal Code 23.60.600(c)(2) because the water dependent use allegedly fails to occupy more than forty percent (40%) of the dry land area of the lot.

4. All issues unresolved by the rulings of partial summary judgment and waiver, above, are dismissed upon appellants' motion.

DONE at Lacey, WA, this 5th day of October, 1990.

SHORELINES HEARINGS BOARD

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